

DEPARTMENT OF PERSONNEL

General Rules and Department Organization

Public Access to Government Records

Proposed New Rules: N.J.A.C. 4A:1-2.1 through 2.11

Proposed Repeal: N.J.A.C. 4A:1-2.1 and 2.2

Proposed Amendments: N.J.A.C. 4A:4-2.16 and 4A:6-4.10

Authorized By: The Merit System Board, Ida L. Castro, Commissioner, Department of Personnel.

Authority: N.J.S.A. 11A:2-6(d), 11A:4-1, 11A:6-26, 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2002-

A public hearing concerning the proposed amendments will be held on:

The Merit System Board Room

Department of Personnel

44 South Clinton Avenue

Trenton, New Jersey

Please call Elizabeth Rosenthal of the Legal Liaison Unit at (609) 984-7140 if you wish to be included on the list of speakers.

Submit written comments by _____, 2002 to:

Henry Maurer, Director

Merit System Practices and Labor Relations

Unit A

Department of Personnel

P.O. Box 312

Trenton, New Jersey 08625-0312

The agency proposal follows:

Summary

On January 8, 2002, the Legislature passed and the Acting Governor approved P.L. 2001, c.404, known as the Open Public Records Act, which enacted changes in the law concerning public access to government records. The law will be effective July 7, 2002. This law expands the public's right of access to government records and facilitates the way in which that access is provided by the custodian of those records. Section 18 of the law authorizes public agencies to take anticipatory administrative action in advance as may be necessary for the smooth and efficient implementation of the act. The act requires the custodian of government records of a public agency to adopt a form for providing public access to government records. Therefore, this rule proposal would establish a process to be followed by members of the public who seek access to government records held or controlled by the Department of Personnel.

The act provides that all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c.73 as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Rules of Court; any Federal law, Federal regulation or Federal order. The Merit System Board, pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), proposes to classify as exempt from public access certain records held or controlled by the Department of Personnel. The act also provides that a public agency should be mindful of the need to safeguard from public access an individual's personal information with which it has been entrusted when disclosure thereof would violate the individual's reasonable expectation of privacy. This proposal is designed to serve these legislative policies by facilitating public access to government records while, at the same time, balancing an individual's reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

First, the Board proposes the repeal of two rules whose provisions would be subsumed in the proposed new rules described more fully below. The two rules proposed for repeal are N.J.A.C. 4A:1-2.1, Department of Personnel access to

appointing authority records and information, and N.J.A.C. 4A:1-2.2, Public records.

Proposed new N.J.A.C. 4A:1-2.1, Scope and applicability, would provide the scope and applicability of the rules contained in Subchapter 2 of Chapter 1 of Title 4A. The new N.J.A.C. 4A:1-2.1 would also include the language of the repealed rule requiring that appointing authorities provide access to representatives of the Department of Personnel to all records and information requested by such representatives. This information would not be limited to government records as defined in N.J.S.A. 47:1A-1 et seq., but to all records necessary to the Department's mission of administering the merit system.

This proposed new rule would further provide that the new rules in Subchapter 2 apply to the Department of Personnel and all of its divisions, units and offices.

Proposed new N.J.A.C. 4A:1-2.2, Custodian of records, would provide that the Commissioner of Personnel shall designate a person to be the Government Records Custodian for the Department. The address of the Government Records Custodian would be set forth in this rule and made available to the public through a posting on the Department web site.

Proposed new N.J.A.C. 4A:1-2.3, Requests for government records, would provide that all requests for access to government records under the new law must be on a form approved by the Department. The requestor would be asked to provide certain information on the form, including a name, address and telephone number; a brief description of the records requested, the type of access (examination, inspection or copying) and medium requested; the requestor's signature and the date he or she submitted the form to the custodian. The form would also provide space for: specific directions and procedures for requesting a government record; which records will be made available; when the record will be available; the fee to be charged; the amount of prepayment of fees required; a statement of the requestor's right to challenge a denial and the procedures for challenging a denial; whether the requestor has agreed to grant an extension of time; the toll free number of the Government Records Council; a certification by the requestor that he or she has not been convicted of an indictable offense; the custodian's signature and the date; and reasons if access is denied. Copies of the form would be available at the office of the Department custodian and on the Department web site.

Proposed new N.J.A.C. 4A:1-2.4, Procedures for requests, would establish the procedure for submitting requests for access to government records. A requestor could submit to the custodian of records a request form by hand-delivery (during

normal business hours), mail or other courier service, or by facsimile, e-mail or web site access. All requests would have to be delivered to the custodian in order to trigger the requirements of the public access to government records law. Upon receipt of the form, the custodian would review it for clarity and completeness, and either advise the requestor of any deficiencies or request additional information, provided the requestor has included contact information. The requestor's identity would be required in order to insure compliance with the provision of the law that prohibits a person convicted of an indictable offense under the laws of this State, any other state or the United States, from receiving personal information concerning the person's victim or the victim's family. The custodian would estimate the fee, which would include the cost of any special form of mailing requested. A request would not be deemed complete until any prepayment required is received by the custodian. A requestor would also be required to prepay any special mailing or delivery costs such as those for UPS or Express Mail. A requestor would not be charged for ordinary mailing costs. There would be no charge for merely inspecting records.

Proposed new N.J.A.C. 4A:1-2.5, Delivery of records, would provide that the balance of any fee over and above the estimated prepaid fee is due on delivery of the record.

Proposed new N.J.A.C. 4A:1-2.6, Immediate access to certain records, would identify the records for which an individual is ordinarily entitled to immediate access. These documents would include budgets, bills, vouchers, contracts and public employee salary and overtime information.

Proposed new N.J.A.C. 4A:1-2.7, Failure to respond, would provide that, except as otherwise provided by law, if the custodian fails to grant access to a government record within seven business days after the custodian receives the completed request or such other time as may be required under the law or may be agreed upon, the failure will be deemed a denial of the request for access. As provided in the statute, a custodian need not respond to an anonymous request until the requestor reappears before the custodian.

Proposed new N.J.A.C. 4A:1-2.8, Records stored offsite, would provide that, if requested records are stored in an offsite storage facility outside of the regular business office of the Department of Personnel, within seven business days of receipt of the request form the custodian shall advise the requestor of the date the records will be available and the estimated cost. This section codifies the requirements of the statute.

Proposed new N.J.A.C. 4A:1-2.9, Requests for copies of a government record in a specified medium, would codify the requirements of the statute concerning delivery of records in the medium requested. The custodian would deliver the record in the medium requested unless the agency does not maintain the record in that medium and cannot reasonably convert it. In such a case, the custodian would advise the requestor of the cost of providing the record in the medium requested. Such charge could include labor costs.

Proposed new N.J.A.C. 4A:1-2.10, Computation of time, concerns the computation of the time by which the custodian must provide a requested record. Consistent with statutes, court rules and case law, the proposed new rule would provide that, in computing the time period for granting access, the day the request is received shall not be included in the computation, but the last day of the period so computed shall be included. This proposed new rule would also clarify that a request is not complete until all necessary information is provided by the requestor and all applicable fees are paid.

Proposed new N.J.A.C. 4A:1-2.11, Records designated confidential, would list the records deemed by the Department of Personnel to be confidential and not subject to public access under the provisions of N.J.S.A. 47:1A-1 et seq. as amended and supplemented. This new rule is proposed under the authority of N.J.S.A.

47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963). Under authority of the statute, that Executive Order authorizes the head or principal executive of each principal department of State government to adopt and promulgate rules setting forth which records of the department shall not be deemed public records. In proposing these exemptions, the Board is mindful of the New Jersey Supreme Court's decision in *Irval Realty, Inc. v. BPU*, 61 N.J. 366, 374 (1972). In that case, the Court held that the Legislature did not intend that the power of excluding records granted to the Governor and by him delegated to the department heads be unlimited.

Therefore, proposed new N.J.A.C. 4A:1-2.11(a)1 would exempt from public access appeal files in Commissioner, Merit System Board and Division of Equal Employment Opportunity and Affirmative Action (EEO/AA) matters. Presently, while Board and Commissioner decisions are public, submissions by the parties are not public. There are several justifications for exempting submissions of the parties and other materials in appeal files. First, an appeal before the Board or the Commissioner is substantially similar to a grievance, which is exempted by Section 11 of L.2002, c.404. Second, many appeal files contain personal information about employees, including medical information, psychological evaluations, social security numbers and other personal details for which the Open Public Records Act already

recognizes privacy concerns. See, e.g., Section 11 of L.2002, c.404. Third, numerous files contain competitive testing information that is not generally subject to public inspection, pursuant to *Brady v. Department of Personnel*, 149 N.J. 244 (1997). Fourth, many such files concern sexual harassment complaints that are exempt from public access under Section 2 of L.2002, c.404. Fifth, many such files concern other forms of discrimination, which, by their very nature, are sensitive matters that are often embarrassing to the employees involved and implicate privacy concerns, including those of witnesses who provide statements with the promise of confidentiality. See N.J.A.C. 4A:7-3.2(m).

Next, proposed new N.J.A.C. 4A:1-2.11(a)2 would exempt from public access complaints, notices and other documents received by the Department of Personnel regarding discrimination, the Americans With Disabilities Act and family leave. The Board submits that these documents should be exempt for the reasons stated regarding exemptions for appeal files. Also, correspondence between the Department and other agencies regarding requests for assistance or direction falls under the category of “inter-agency advisory, consultative or deliberative material” not subject to public inspection pursuant to Section 2, L.2002, c.404.

Proposed new N.J.A.C. 4A:1-2.11(a)3 would exempt Employee Advisory Service (EAS) and Workplace Violence Program records received by EAS. EAS records are

already confidential in accordance with N.J.A.C. 4A:6-4.10, and have been since the inception of the EAS program in the 1980s. As the EAS assists employees with a variety of personal problems, it would be a serious invasion of privacy (and would destroy the effectiveness of EAS) to allow public inspection of EAS records. With respect to Workplace Violence Program records, these, too, concern sensitive information that could, if publicly released, constitute an invasion of affected employees' privacy. It is noted that N.J.A.C. 4A:6-4.10(c), which provides for the confidentiality of EAS records, would be amended to include a cross-reference to N.J.A.C. 4A:1-2.11.

The Board also proposes a new N.J.A.C. 4A:1-2.11(a)4, which would exempt many selection and appointment materials. Most of these exemptions are intended to preserve examination security, a statutory responsibility of the Department of Personnel. See N.J.S.A. 11A:4-1(c). This responsibility is particularly implicated in proposed new subparagraphs (a)4ii, iii, v and vi, and was extensively reviewed by the New Jersey Supreme Court in *Brady v. Department of Personnel*, 149 N.J. 244 (1997). The issue before the Court in *Brady, supra*, was how much access the examinee may have to testing materials to substantiate a challenge against the Department of Personnel's scoring of his or her examination. The Court held that the examinee is "entitled to obtain only such evidence that reasonably may enable

an examinee to assess the correctness of his or her answers and to demonstrate that the DOP's grading of his or her examination constituted an abuse of discretion." *Id.* at 257. The Court went on to uphold the examination review process instituted by the Department: "...[Examinees] are provided with a summary of the questions, their complete answers, and a summary of the PCAs [possible courses of action]. Further, they are entitled to an internal review in which their answers are reexamined, and they are furnished with personalized explanations of the basis for their grade on each dimension. An examinee should be able to determine from this process whether DOP appears to have acted arbitrarily in scoring his or her examination." *Id.* at 263. It is important to note that the Department does *not* permit an examinee during the examination review process to take away any of the information with which he or she is provided review access. Although there may be instances where further testing information may be disclosed to an examinee, this would be done solely pursuant to a protective order issued by a court. Therefore, in light of the limited instances under which an examinee may review testing materials affecting his or her own score, access to such materials by the general public should be, and presently is, even more limited.

With regard to applications for open competitive and promotional exams, referred to in subparagraph (a)4i, the Department of Personnel considers

examination applications to be part of an individual's personnel file, which is exempted from public disclosure by Section 11, L.2002, c.404. Additionally, the current N.J.A.C. 4A:4-2.16 has long contained an exemption from public access for applications.

With respect to the identity of Subject Matter Experts (SMEs), test vendors and test assessors, the Board proposes a new N.J.A.C. 4A:1-2.11(a)4iv that exempts information about them from public access. SMEs develop test items, while test assessors administer or score examinations. Vendors also develop certain examinations. The Board is concerned that public access to their identities would almost certainly compromise the confidentiality and security of the testing process. Such individuals and companies may be subject to repercussions from disgruntled examinees. There is a substantial risk that examinees may attempt to contact them before or after administration of a test.

Moreover, reasons an appointing authority bypassed an individual on an eligible list or requested the removal of an eligible's name from a list must be kept confidential, as proposed in the new subparagraph (a)4vii. Publicly divulging such information would be an invasion of privacy. The same goes for documents regarding an examinee's reasonable accommodation request, referred to in the

proposed new subparagraph (b)5viii, which, in any case, is also protected from disclosure by the Americans With Disabilities Act.

A proposed new N.J.A.C. 4A:1-2.11(a)5i would exempt from public access information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

Proposed new subparagraph (a)5ii would exempt social security numbers, home and e-mail addresses, home telephone numbers, credit card numbers, driver's license numbers and other personal contact information. Section 2, L.2002, c.404, provides for the exemption from public access of social security numbers, credit card numbers, unlisted telephone numbers and driver's license numbers. Although the new law does not exempt listed home telephone numbers, the Board foresees problems with having to allow public access to them through Department of Personnel records. First, the Department would have no practical way of knowing which home telephone numbers in its files are listed or unlisted. Second, it is one thing for an individual to look up a telephone number in a phone book and quite another for an individual to ask for or be permitted to have, for example, home telephone numbers of all test candidates for a particular title. Complying with any such requests could lead to abuse of the information by the requestor. It is the Board's position that, should an individual be interested in obtaining certain phone

numbers, the individual should look up the information in the only ways it is now publicly available—in the phone book, on the Internet or through Directory Assistance. Likewise, home and e-mail addresses should not be disclosed due to a substantial risk that release of such information may be subject to abuse.

Also proposed are new N.J.A.C. 4A:1-2.11(a)5iii and iv, which would exempt from public access records regarding income tax returns and other types of tax returns and information describing an individual's personal finances, assets, credit worthiness and related data.

Additionally, the Board proposes a new N.J.A.C. 4A:1-2.11(a)6, which would exempt records sent to the Department of Personnel from other agencies when such records have been exempted by those agencies' rules or by another law from public disclosure. It is the Board's position that, if the source agency cannot disclose this information to the public, the Department of Personnel should not be able to, either.

The final new provision the Board proposes is N.J.A.C. 4A:1-2.11(a)7, which would establish the responsibility for access to records of the Department of Personnel held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Record Management (DARM) in the Department of State or stored in an offsite storage facility outside of the regular

business office of the Department of Personnel. Subparagraph (a)7 would further provide for legal custody of, and responsibility for access to, Department of Personnel records transferred to the State Archives.

Lastly, the Board proposes an amendment to N.J.A.C. 4A:4-2.16, Retention and inspection of examination records, which would delete language in subsection (b) permitting public inspection of certain examination records. This language is no longer needed in the rule since the proposed new N.J.A.C. 4A:1-2.11 would exempt certain examination records from public access, thereby allowing public access to all such records not specifically exempted.

Because a 60-day comment period has been provided on this notice of proposal, this notice is excepted from the rulemaking calendar requirement set forth in N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed repeal, new rules and amendments would implement the requirements of N.J.S.A. 47:1A-1 et seq. as amended and supplemented by P.L. 2001, c.404. This proposal would have a positive social impact by establishing a procedure for public access to government records held or controlled by the

Department of Personnel. The law requires that government records be readily accessible for inspection, copying or examination by members of the public unless exempt by law or regulation, but also calls upon a public agency to safeguard from public access an individual's personal information with which it has been entrusted when disclosure would violate the individual's reasonable expectation of privacy. The proposed repeal, new rules and amendments rules attempt to balance the competing policies in the statute and to exclude records where it would not be in the public interest to permit indiscriminate disclosure or copying of certain records.

The proposal would also provide safeguards to protect certain Department of Personnel records from public access, in an attempt to balance the interests of three important groups: the Department of Personnel, its customers and the general public. The Department has a compelling interest in providing its statutorily mandated services, such as merit system testing, the overall appointment and selection process, review of appeals regarding a wide variety of employee issues, employee counseling and enforcement of anti-discrimination laws. The Department's customers, particularly merit system employees and applicants for employment throughout State and local government, have a compelling interest in privacy. The protection of an individual's personal information, including home address, telephone number, home e-mail address, social security number, driver's

license number and credit card numbers, is essential for a government agency that obtains access to such information for limited purposes. Likewise, information pertaining to discrimination, ADA, family leave and notices and correspondence received by the Division of EEO/AA must be kept confidential to protect against the release of personal, and sometimes embarrassing or sensitive, information.

Finally, the general public has an interest in open government and access to government records that may be educational or informative regarding the functioning of government. It is noted, however, that the general public also includes public employees and merit system job applicants who have a strong stake in the Department of Personnel's ability to carry out its statutorily mandated functions. The Board believes that the proposed amendments address and balance the needs and concerns of all three interest groups.

Economic Impact

The proposal would not have an economic impact on the public in excess of that provided by the statute. Persons requesting copies of government records would be required to pay the fees authorized by the statute for copies of records. The proposed rules would not impose any additional costs. The cost incurred by a

requestor would depend on the type and volume of records requested and the medium of delivery.

The Department of Personnel, however, would incur costs in processing requests for access to government records in the time set by the Act. In particular, it is possible that the Department of Personnel could incur substantial costs resulting from staff time devoted to additional copying and redacting of records and downloading of information from the computer system, as well as costs associated with paper supplies, copy machine supplies and computer software needs. A substantial cost could also be exacted on competitive examination development should the security of the testing system be compromised due to public access to previously confidential examination information.

Federal Standards Statement

A Federal standards analysis is not required because the proposal is not subject to any Federal standards. The Federal Freedom of Information Act, 5 U.S.C. 550a et seq., does not apply to records of State government and does not constitute a Federal standard.

Jobs Impact

The proposal would not have an impact on the number of jobs generated or lost in the private sector in New Jersey. It could, however, require the Department of Personnel to designate numerous employees to assist the custodian of records in responding to requests for public access.

Agriculture Industry Impact

The proposal would not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The proposal would not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposal would impose compliance requirements on all persons seeking access to government records pursuant to N.J.S.A. 47:1A-1 et seq. as amended and supplemented. All persons, including small businesses, would be required to submit requests for access to government records on a form approved by the Department of Personnel. The statute requires the custodian of records to adopt a

form for access to records. The statute authorizes fees for copies of government records. There is no exception for small businesses. The cost of access depends on the number of copies requested. The proposal would provide that the fee will be the maximum set forth in the statute or a fee authorized by the statute that does not exceed the actual cost of providing the record. The cost to the Department of Personnel resulting from providing the record would not depend on whether the requestor is a small business.

Smart Growth Impact

The proposal would not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

SUBCHAPTER 2. GOVERNMENT RECORDS

[4A:1-2.1 Department of Personnel access to appointing authority records and information

Appointing authorities shall provide Department of Personnel representatives free access to their premises and to requested records and information.]

[4A:1-2.2 Public records

- (a) The following Department of Personnel records shall be public:
 - 1. An individual's name, title, salary, compensation, dates of government service and reason for separation;
 - 2. Information on specific educational or medical qualifications required for employment;
 - 3. Final orders of the Commissioner or Board; and
 - 4. Other records which are required by law to be made, maintained or kept on file.
- (b) Individual personnel records, except as specified in (a)1 through 3 above, are not public records and shall not be released other than to the subject employee, an authorized representative of the employee, or governmental representatives in connection with their official duties.
- (c) See N.J.A.C. 4A:4-2.16 concerning examination records.]

4A:1-2.1 Scope and applicability

The rules in this subchapter apply to the Department of Personnel and all of its divisions, units and offices. Notwithstanding any language in this subchapter to the contrary, appointing authorities shall provide Department of Personnel representatives free access to their premises and to requested records and information.

4A:1-2.2 Custodian of records

(a) Pursuant to P.L. 2001, c. 404, the Commissioner shall designate a custodian of records for the Department of Personnel, who shall be responsible for all requests for access to government records submitted to the Department of Personnel.

(b) The address and other contact information for the records custodian shall be posted on the Department of Personnel web site and otherwise made available to the public. The contact information is as follows:

Government Records Custodian

Department of Personnel

Office of the Commissioner

P.O. Box 317

Trenton, New Jersey 08625-0317

4A:1-2.3 Requests for government records

(a) All requests for access to government records pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented, held or controlled by the Department of Personnel, shall be in writing on a form approved by the Department. For the purposes of this subchapter, access means inspection, examination or copying.

(b) The requestor shall be requested to provide the following information on the form:

1. The name, address, and telephone number of the requestor;
2. A description of the government record sought, method of access and if copies are sought, the medium requested and mode of delivery; and
3. The date submitted to the custodian.

(c) The request form shall also include an identified space for:

1. The custodian to indicate whether the request is granted or denied;

2. Specific directions and procedures for requesting a record;
3. A statement that prepayment of fees is required and the fees to be charged;
4. The time period within which the public agency is required to make the record available;
5. The custodian to sign and date the form;
6. A statement of the requestor's right to challenge a decision by the custodian to deny access;
7. The reasons for a denial of a request, in whole or in part;
8. The procedures for challenging a denial of access;
9. The custodian to indicate whether the requestor has agreed to grant an extension of time;

10. A certification by the requestor that he or she has not been convicted of an indictable offense under the laws of this State, any other state or the United States; and

11. The toll free telephone number of the Government Records Council.

(d) Copies of the request form shall be made available at the office of the Department custodian and on the Department web site.

4A:1-2.4 Procedures for requests

(a) A requestor may submit to the custodian of records a request form by hand-delivery (during normal business hours), mail or other courier service, or by facsimile, e-mail or web site access.

(b) Any officer or employee of the Department who receives a request for access to a government record shall direct the requestor to the custodian of records.

(c) Upon receipt of the request form, the custodian shall review the form for clarity and completeness. If the form is unclear as to the government record requested, the custodian shall advise the requestor of the deficiency, provided contact information is included on the form. The custodian may require the requestor to provide additional information to identify the record or to ascertain the requestor's identity and status to determine whether access is authorized. The custodian shall deny a request for access if the request is unclear or incomplete after attempting to reach a reasonable resolution with the requestor. A request shall not be deemed complete until the pre-payment required under this section is received by the custodian.

(d) Upon receipt of a request form, the custodian shall estimate the cost of providing the records and shall require the pre-payment of the estimated sum, and of any special mailing or delivery costs. Payment shall be made by cash, check or money order payable to the New Jersey Department of Personnel. Except as provided otherwise by statute or rule, costs shall be those set forth in N.J.S.A. 47:1A-1 et seq., as amended and supplemented.

(e) The custodian shall sign and date the request form, enter the estimated fee and provide the requestor with a copy of the form.

(f) No fee shall be charged for inspecting or examining government records.

(g) Upon request, a custodian may allow requestors to use their own photocopying equipment to copy government records, provided that such equipment will not disrupt the business operations of the custodian and will not endanger the records. No special fee shall be charged to a requestor who utilizes his or her own equipment.

4A:1-2.5 Delivery of records

The custodian shall notify the requestor when the records are available and shall collect any additional fees and charges due prior to delivery of copies.

4A:1-2.6 Immediate access to certain records

Immediate access ordinarily shall be granted for requests to inspect, examine or copy budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and merit system employee salary and overtime information.

4A:1-2.7 Failure to respond

Except as otherwise provided in this subchapter, a custodian shall grant or deny access within seven business days after receiving a request completed in accordance with N.J.A.C. 4A:1-2.4 or such additional time as may be allowed by statute or these rules or as may be agreed to by the requestor. The failure to grant access shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address, telephone number or other means of contact. If the requestor has elected not to provide contact information, the custodian shall not be required to respond until seven business days after the requestor reappears before the custodian to seek a response to the original request.

4A:1-2.8 Records stored offsite

If the requested record is in storage offsite at a facility outside of the regular business office of the Department of Personnel, the custodian shall so advise the requestor within seven business days after the custodian receives the request. The custodian shall advise the requestor of the date when the record will be made available. If the record is not made available by the identified date, the request shall be deemed denied.

4A:1-2.9 Requests for copies of a government record in a specified medium

(a) Unless otherwise specifically requested, copies of records shall be provided in printed form on ordinary business size paper. The requestor may request that the Department provide a copy of a record in a specific medium. If the Department maintains the government record in the medium requested, the custodian shall provide the record in the medium sought.

(b) If the Department does not maintain the government record in the medium requested, the custodian shall convert the record to the medium requested, if reasonable, or provide a copy in some other meaningful medium. If a requestor asks for copies of a record in a medium not routinely used by the Department, not routinely developed or maintained by the Department, or requiring a substantial amount of manipulation or programming of information technology, the custodian may charge, in addition to the actual cost of duplication, a special charge which shall be reasonable and shall be based upon the cost of any extensive use of information technology or for the labor cost of providing the service actually incurred. The requestor shall be given the opportunity to review and object to the charge prior to its being incurred. If the requestor objects to the charge and refuses to withdraw the request, the custodian may deny the request after attempting to

reach a reasonable solution that accommodates the interests of both the requestor and the Department.

(c) Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined or copied is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the Department may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies. The requestor shall have the opportunity to review and object to the charge prior to its being incurred. If the requestor objects to the charge and refuses to withdraw the request, the custodian may deny the request after attempting to reach a reasonable solution that accommodates the interests of both the requestor and the Department.

4A:1-2.10 Computation of time

(a) In computing any period of time under P.L.2001, c. 404 or these rules, the business day a completed request for access is received shall not be included. The last business day of the period so computed shall be included.

(b) For purposes of P.L. 2001, c. 404 and these rules, a request for access is deemed to be complete when the requestor provides the information required by N.J.A.C. 4A:1-2.3 of these rules and pre-pays the fees required by P.L. 2001, c. 404 and these rules.

4A:1-2.11 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other statute, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rule of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Appeal files in Merit System Board, Commissioner of Personnel and Division of Equal Employment Opportunity and Affirmative Action matters, including written submissions of the parties and all other related documentation used to make an administrative determination in these matters;

2. Discrimination, Americans with Disabilities Act, State Family Leave Act and Federal Family and Medical Leave Act complaints, and notices and other correspondence pertaining to such complaints, received by the Department of Personnel;

3. Employee Advisory Service records, including Workplace Violence Program records received from other agencies, except as provided in N.J.A.C. 4A:6-4.10;

4. The following selection and appointment materials:

i. Applications for examinations or employment;

ii. Examination papers, including the test booklets, stimulus material, test questions, answer sheets, assessor ratings and notes, questionnaires and audio and video tapes of candidates' test performances;

iii. Scoring information, including rating scales, scoring criteria, answer keys, construction sheets that identify the item numbers scored under different subtests, calculations regarding the combining of test components and weighting, unassembled examination scoring and scoring standards, and failure results;

iv. Information regarding Subject Matter Experts (SMEs), test vendors and test assessors, including the identification of SMEs and test vendors; vendor telephone bid quotes regarding services to be performed; work performed by

SMEs and vendors; and training and evaluation materials for assessors, raters and SMEs such as scoring criteria and mock test items;

v. Examination validity and reliability data and validity documentation, including the job analysis, reports concerning content validity and predictive validity (including cut score recommendations), and examination work information sheets (which identify factors measured by the examination);

vi. Technical Standards Manuals;

vii. Reasons stated on or attached to a certification disposition indicating why an appointing authority bypassed an individual or requested the removal of an individual's name from an eligible list;

5. Information concerning individuals as follows:

(i) information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

(ii) home addresses, home telephone numbers, personal e-mail addresses, credit card numbers, driver's license numbers, social security numbers or other personal contact information;

(iii) Information in an income or other tax return; and

(iv) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness, except as otherwise required by law to be disclosed;

6. Records of another department, or an agency allocated to that department, that are in the possession of the Department of Personnel, when those records are made confidential by a rule of that other department or agency that has been adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing that other department or agency to make records confidential or exempt from disclosure; and

7. Records of the Department of Personnel held by the Office of Information Technology (OIT) or the State Records Storage Center of Division of Archives and Record Management (DARM) in the Department of State or stored in an offsite storage facility outside of the regular business office of the Department of

Personnel. Such records shall remain the legal property of the Department of Personnel and be accessible for inspection or copying only through a request to the custodian of records of the Department of Personnel. In the event that Department of Personnel records have been or shall be transferred to and accessioned by the State Archives in DARM, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

4A:4-2.16 Retention and inspection of examination records

(a) The following examination records shall be retained until the expiration of the eligible list:

1. The public announcement;
2. All applications;
3. The examination papers and scoring keys;
4. A description of the examination, including the date held, rating system and minimum score required, if any;
5. The list of eligibles; and
6. Any other pertinent information.

(b) [All examination records listed in (a)1, 4 and 5 above shall be open to public inspection. The Commissioner shall determine which other records may be

open to public inspection and the conditions for such inspection.] See N.J.A.C. 4A:1-2.11 for examination records open to public inspection.

4A:6-4.10 Employee Advisory Service: State service

(a) The Department of Personnel shall establish an Employee Advisory Service (EAS) to assist State employees in achieving and maintaining the highest level of job performance of which they are capable. EAS shall provide access to counseling, rehabilitative and/or community services for a State employee who:

1. Has received an annual performance rating at the lowest level. See N.J.A.C. 4A:6-5.1 et seq.

2. Has received a performance rating which is below the mid-point on the multi-level scale and an improvement plan has not been effective;

3. Is experiencing personal problems which affect job performance; or

4. Has a family member who is experiencing personal problems which affect the employee's job performance.

(b) Employees may voluntarily contact EAS or may be referred to EAS by the appointing authority. If the employee consents, he or she may be referred by a

union or association representative. An employee should be referred to EAS as soon as problems are manifested which may affect job performance.

(c) Except as conditioned below or where there is an overriding health or safety need, all EAS information regarding an employee is confidential. See N.J.A.C. 4A:1-2.11.

1. An employee may authorize in writing the release of all or part of such information.

2. In appointing authority referrals, the appointing authority may be informed:

- i. Whether an individual has been accepted for a program;
- ii. Whether or not an employee has kept his or her appointments;
- iii. The dates and times of future appointments with either EAS or an outside agency; and

iv. The estimated amount of time needed to complete the program if reasonably ascertainable.

(d) Appointments for appointing authority referred employees shall be scheduled through the personnel office.

1. An employee shall be given time off with pay for the intake and evaluation visits. For other situations and visits, arrangements shall be set by the employee and appointing authority, which may include use of available sick or other leave.

2. When an appointing authority referred employee fails to keep a scheduled appointment or does not accept a referral from EAS, the appointing authority shall be notified of the matter by EAS.

(e) EAS shall monitor the progress of all employees. To maintain active client status, an employee must follow the prescribed EAS program.

(f) An appointing authority that is informed that an employee is receiving services through EAS, shall consult with the supervisor of the EAS program prior to seeking removal of the employee.

(g) State health or other benefit programs may be utilized where applicable.

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